

STATE OF SOUTH DAKOTA

OFFICE OF

THE ATTORNEY GENERAL

June 21, 2012

Honorable Dennis Daugaard
South Dakota Governor
500 East Capitol
Pierre, SD 57501

OFFICIAL OPINION NO. 12-02

RE: Sale of 85 Octane Gasoline

Dear Governor Daugaard:

You have requested an official opinion from this Office regarding the following question:

QUESTION: Whether South Dakota law prohibits the sale of gasoline with an antiknock index rating of 85 octane in South Dakota.

ANSWER: Under current rules promulgated by the Department of Public Safety, gasoline or gasoline-oxygenate blends (hereinafter "gasoline") with an antiknock index rating of 85 octane may not be legally sold in the state. The National Institute of Standards and Technology (NIST) standards adopted by the Department prohibit the sale of gasoline with an antiknock index of less than 86 octane. This prohibition does not conflict with other statutes and administrative rules, and is therefore controlling.

FACTS: The Department of Public Safety Office of Weights and Measures (Public Safety or Department) has been investigating alleged mislabeling of gasoline in South Dakota. The investigation arose out of information Public Safety received that gasoline with an antiknock index rating of 85 octane was being sold under 87 octane labels. If true, the mislabeling could violate the antiknock index labeling requirements of SDCL 37-2-13; the Petroleum Marketing Act, 15 U.S.C. § 2821 et seq.; and rules promulgated by the Federal Trade Commission in 16 C.F.R. Part 306.

During Public Safety's investigation, an issue arose concerning the legality of selling gasoline with an antiknock index rating of 85 octane. Public Safety has advised that the use of gasoline with an antiknock index rating below levels

recommended by motor vehicle manufacturers may result in a loss of engine performance, and, with long term use, engine damage. Public Safety further advised that for vehicles manufactured after 1984, motor vehicle manufacturers generally recommend gasoline with an antiknock index rating of 87 octane or greater.

Prior to your request for an official opinion, Public Safety concluded that the sale of gasoline with an antiknock index rating of 85 octane could not be sold legally in the state under the NIST standards the Department adopted in accordance with state law. Public Safety determined that the prohibitions in the NIST standards were not in conflict with any ASTM standard also adopted by the Department, nor with any other administrative rule or state statute.

Finally, I am aware that Public Safety is contemplating the promulgation of emergency and/or permanent rules that would allow for the sale of 85 octane gasoline in the state.

IN RE QUESTION:

SDCL ch. 37-2 regulates the sale of petroleum products within the State.

Under SDCL §§ 37-2-6 and 37-2-7, the Legislature delegated rule-making authority to the Department to establish standards for petroleum products, and testing. SDCL 37-2-6 provides in pertinent part:

The secretary of the Department of Public Safety may, pursuant to chapter 1-26, and in general conformity with ASTM and NIST standards in effect on January 1, 2005, promulgate rules:

. . .

(4) Establishing standards setting the specifications and tolerance requirements for petroleum products, biodiesel, and biodiesel blends;

SDCL 37-2-7 provides:

Specifications and methods for the examination and test of petroleum products shall be jointly determined by the Division of Commercial Inspection and Licensing and the director of the State Health Laboratory and shall be based upon standards for the American Society for Testing and Materials and the National Institute for Standards and Technology as of January 1, 2005. If adopted as rules of the division in accordance with the provisions of chapter 1-26, the specifications shall be the specifications for

such petroleum products sold in this state and official tests of the petroleum products shall be based upon test specifications so determined, adopted, and promulgated.

SDCL 37-2-12 prohibits the sale of gas in violation of certain regulations:

No person shall sell or keep and offer for sale any gasoline or other motor fuel which does not conform as to color and antiknock characteristics contained in the rules and regulations adopted under the authority of § 37-2-7.

SDCL 37-2-13 provides:

Each retail dealer of gasoline or gasoline-oxygenate blends shall post the antiknock index in accordance with the applicable regulations, contained in 16 C.F.R. Part 306, issued pursuant to the Petroleum Marketing Act, as amended through January 1, 2009. The antiknock index (AKI) may not be less than the AKI posted on the product dispenser or as certified on the invoice, bill of lading, shipping paper, or other documentation.

A violation of the §§ 37-2-5 to 37-2-13 is a Class 2 misdemeanor. SDCL 37-2-16. Private actions are authorized. SDCL 37-2-15.

SDCL 37-2-13 regulates the labeling requirements concerning antiknock index ratings for gasoline sold in the state by adopting federal law. The federal law mandates that a gasoline retailer label the antiknock index of its gasoline at the octane rating certified to the retailer by the gasoline distributor. 16 C.F.R. 306.10. It does not set "minimum" antiknock octane ratings that must exist for gasoline to be labeled as "premium" or "regular" or "economy" index levels. Federal law only requires that the labeling on the pump be accurate.

Under SDCL §§ 37-2-6, 37-2-7, and 37-2-12, the Legislature authorized Public Safety to determine the acceptable octane ratings (antiknock characteristics) of gasoline sold within the state. Under SDCL §§ 37-2-6 and 37-2-7, Public Safety has promulgated rules that adopt NIST and ASTM antiknock index standards for gasoline sold within the state. Pursuant to its delegated authority, the Department has adopted two regulations central to this analysis. ARSD 20:01:02:03 provides:

Except where in conflict with existing codified law or administrative rule, South Dakota shall follow uniform laws and regulations adopted by the 89th National Conference of Weights and Measures, 2004, as they appear in NIST Handbook 130, 2005, with the

exception of sections IIIB, Uniform Weighmaster Law, and IVC, Uniform Unit Pricing Regulation.

ARSD 20:15:06:01 provides:

The method to be used for inspection and testing of petroleum products and the standards for the specification and tolerance requirements for petroleum products are those in the 2005 Annual Handbook of the American Society for Testing and Materials, [ASTM] Volume 05.01, 05.02, 05.03, and 05.04.

The adopted NIST and ASTM standards govern the antiknock index ratings for gasoline which may be sold in South Dakota. Applicable NIST standards are found in Handbook 130 (2005), “Uniform Engine Fuels, Petroleum Products, and Automobile Lubricants Regulations,” at Section 2, “Standard Fuel Specifications,” and Section 3, “Classification Methods for Sale of Petroleum Products.” The ASTM standards are found in “Designation D 4814-04a, Standard Specification for Automotive Spark-Ignition Engine Fuel.”

NIST Fuel Specifications Standards require, first, that the antiknock index of gasoline not be less than that posted on the product dispenser (§ 2.1.3); second, that gasoline be labeled as required by 16 C.F.R. Part 306 (§ 3.2.1); and third, that the labeling of gasoline (e.g., “premium” or “regular”) complies with the following minimum antiknock index requirements (NIST § 3.2.5):

| Table 1. Minimum Antiknock Index Requirements | | |
|---|---|-----------------------------|
| Term | Minimum Antiknock Index | |
| | ASTM D 4814 Altitude Reduction Areas IV and V | All Other ASTM D 4814 Areas |
| Premium, Super, Supreme, High Test | 90 | 91 |
| Midgrade, Plus | 87 | 89 |
| Regular Leaded | 86 | 88 |
| Regular, Unleaded (alone) | 85 | 87 |
| Economy | -- | 86 |

(Table Amended 1997)

It is this third requirement that is responsive to your question. The “ASTM D 4814 Areas” referenced in Table 1 of the NIST Fuel Specifications Standards are set forth in ASTM D 4814 Appendix, Figure XI.2. Under this Figure, South Dakota is in Area I with the exception of the western portion of the state, generally comprised of the Black Hills, which is in Area III. Unlike Wyoming and Colorado, none of South Dakota is in Areas IV or V. Therefore, NIST §3.2.5 requires that gasoline labeled as “economy” in South Dakota have a minimum antiknock index rating of 86 octane; this labeling requirement does not authorize the labeling of any gasoline with an antiknock index rating of 85 octane.

Based upon the antiknock index labeling requirements under state and federal law, together with the NIST minimum antiknock index labeling requirements in NIST § 3.2.5 and Table 1, the Department has previously concluded that gasoline with an antiknock index rating of less than 86 octane cannot be legally sold within the state. Its rationale was that gasoline that does not comply with the octane ratings set forth in the NIST minimum antiknock index (such as 85 octane gasoline) cannot be labeled in compliance with NIST § 3.2.5 and Table 1 (because the minimum antiknock index requirement for “economy” gasoline in South Dakota is 86 octane gasoline). Therefore 85 octane gasoline cannot be sold in South Dakota. Based upon my review, I concur with this determination. I further concur with the Department that the ASTM’s standard adopted in ARSD 20:15:06:01 does not conflict with the NIST standards.

An argument may be raised that the text of the ASTM D 4815-04a Appendix allows or requires a different result. The ASTM Appendix referenced in the NIST Standards does use the “Area” description set forth above to discuss potential reductions in octane levels (antiknock indices) due to altitude and certain meteorological conditions. However, the ASTM Appendix is specifically labeled as “Nonmandatory Information.” (As an advisory from the ASTM states: “An Appendix is considered non-mandatory, it is for information only.” See <http://www.a2la.org/conclaves/conclave2009/minutes/Material%20testing%20Advisory%20Committee%20Summary%20-%20Attachment%202.pdf>).

The adoption in rule of the ASTM Designation does not alter the non-mandatory character of the Appendix and cannot be interpreted to separately create a mandatory set of reductions that can be applied in South Dakota. The rules of statutory construction, applicable to administrative rules (*Westmed Rehabilitation, Inc. v. Department of Social Services*, 2004 S.D. 104, ¶ 8, 687 N.W.2d 516, 518), require that words and phrases be given their plain meaning and effect. *In re Estate of Hamilton*, 2012 S.D. 34, ¶ 7; *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611. The ASTM Appendix is plainly labeled as “Nonmandatory Information.” In contrast, the NIST provisions contain no such caveat and indeed, specifically establish standards and requirements. As a result, the NIST provisions must be interpreted to control over the non-mandatory information expressed in the ASTM Appendix. There simply is no conflict, with the mandatory NIST provisions controlling.

Conclusion

The conclusion that gasoline with an antiknock index rating of 85 octane may not be sold in South Dakota is based upon current statutes and rules. The Legislature, and the Department of Public Safety, to the extent it has authority under SDCL §§ 37-2-6 and 32-2-7, may alter this arrangement to authorize the sale of 85 octane gasoline in the state.

Very truly yours,

A handwritten signature in black ink, appearing to read "Marty Jackley", written in a cursive style.

Marty Jackley
Attorney General

MJJ/JPH/jkp